UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

TRANSCARE CORPORATION, *et al.*,[1]

Debtors,

Bankr. Case No.: 16-10407 (SMB)
Chapter 7
(Jointly Administered)

JOSEPH PENA, MICHELLE ESCOBAR, and MERCEDES TAVAREZ, on behalf of themselves and others similarly situated,

Plaintiffs,

-against-

Adv. Case. No.: 16-01048 (SMB)

TRANSCARE CORPORATION, TRANSCARE NEW YORK, INC., TRANSCARE ML, INC., TC AMBULANCE GROUP, INC., TRANSCARE MANAGEMENT SERVICES, INC., TCBA AMBULANCE, INC., TC BILLING AND SERVICES CORPORATION, TRANSCARE WESTCHESTER, INC., TRANSCARE MARYLAND, INC., TC AMBULANCE NORTH, INC., TRANSCARE HARFORD COUNTY, INC., PATRIARCH PARTNERS, LLC, PATRIARCH PARTNERS III, LLC, ARK CLO 2001-1 LIMITED, ARK INVESTMENT PARTNERS II, L.P., and ARK INVESTMENT GP II, LLC,

Defendants.

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SHAMEEKA IEN on behalf of herself and all others similarly situated,

Plaintiff,

-against-

Adv. Case. No.: 16-01033 (SMB)

TRANSCARE CORPORATION, TRANSCARE NEW YORK, INC., TRANSCARE ML, INC., TC AMBULANCE GROUP, INC.,

[1] The Debtors consist of TransCare Corporation, TransCare New York, Inc., TransCare ML, Inc., TC Ambulance Group, Inc., TransCare Management Services, Inc., TCBA Ambulance, Inc., TC Billing and Services Corporation, TransCare Westchester, Inc., TransCare Maryland, Inc., TC Ambulance North, Inc., and TransCare Harford County, Inc. On February 29, 2016, Salvatore LaMonica, the court-appointed Chapter 7 Trustee (the "Trustee"), moved for an Order, pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, directing the joint administration of the Debtors' cases under the modified caption of *In re: TransCare Corporation*, *et al.*, Case No.: 16-10407(SMB). The Trustee's motion was granted on March 1, 2016.

TRANSCARE MANAGEMENT SERVICES, INC., TCBA AMBULANCE, INC., TC BILLING AND SERVICES CORPORATION, TRANSCARE WESTCHESTER, INC., TRANSCARE MARYLAND, INC., TC AMBULANCE NORTH, INC. AND TRANSCARE HARFORD COUNTY, INC., LYNN TILTON, ARK CLO 2001-1 LIMITED, ARK INVESTMENT PARTNERS II, L.P., PATRIARCH PARTNERS, LLC, and PATRIARCH PARTNERS III, LLC,

Defendants.

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PENA PLAINTIFFS' MEMORANDUM OF LAW OBJECTING TO IEN PLAINTIFF'S MOTION PURSUANT TO FED. R. BANKR. P. 7023(g) FOR DISMISSAL OF PENA'S COMPLAINT AND APPOINTMENT OF OUTTEN & GOLDEN AS INTERIM CLASS COUNSEL, AND IN SUPPORT OF PENA PLAINTIFFS' CROSS MOTION PURSUANT TO RULES 42(a) AND 23(g) FOR CONSOLIDATION OF RELATED ACTIONS AND FOR THE APPOINTMENT OF CARY KANE AND OUTTEN & GOLDEN AS CO-INTERIM CLASS COUNSEL

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Plaintiffs Joseph Pena, Michelle Escobar, and Mercedes Tavarez, *et al.*, by their attorneys, Cary Kane LLP, respectfully submit this Memorandum of Law in Support of their Motion for Consolidation of Related Actions and for the Appointment of Cary Kane ("Cary Kane") as Co-Interim Class Counsel, and in objection to the motion to dismiss filed by counsel for plaintiff Shameeka Ien. *See* Ien Plaintiff's Memorandum of Law in Support of Motion Pursuant to Fed. R. Bankr. P. 7023(g) For Appointment of Interim Class Counsel (the "Ien Motion" or "Ien Br."). The Ien Motion seeks the appointment of Outten & Golden LLP ("Outten & Golden") as interim class counsel and the dismissal of the subsequently filed action filed by Plaintiffs here, titled *Pena, et al. v. TransCare Corporation, et al.*, Adv. Proc. Case No.: 16-01048 (the "Pena Action" or "Pena Complaint") or, in the alternative, the consolidation of the Pena Complaint with the previously filed complaint titled *Ien v. TransCare Corporation*, Adv. Proc. Case No.: 16-1033 (the "Ien Complaint"), and any substantively similar actions filed by former employees of the debtor-defendants TransCare Corporation, TransCare New York, Inc., TransCare ML Inc., TC Ambulance Group, Inc., TransCare Management Services, Inc., TCBA Ambulance, Inc., TC Billing and Services Corporation, TransCare Westchester, Inc., TransCare Maryland, Inc., TC Ambulance North, Inc., and TransCare Harford County, Inc. ("TransCare" or "debtors"), and its parent companies.

PRELIMINARY STATEMENT

The Pena Plaintiffs,[2] by their undersigned counsel, respectfully move the Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, for the consolidation of the above-captioned related cases, and for the appointment of Cary Kane and Outten & Golden as Co-Interim Class

[2] The "Pena Plaintiffs" are the 194 former TransCare employees who have retained, and are represented by, Cary Kane to date, including named plaintiffs Joseph Pena, Michelle Escobar, and Mercedes Tavarez.

Counsel for all related cases, pursuant to Rule 23(g)(2)(A) of the Federal Rules of Civil Procedure. The Pena Plaintiffs further submit this memorandum of law in objection to the Ien Motion seeking the dismissal of this action, and in support of Ien's alternative argument for consolidation.

Consolidation of the above-captioned cases and the appointment of Cary Kane and Outten & Golden as Co-Interim Class Counsel is in the best interests of the class. The detailed factual allegations set forth in the Pena Complaint add substantial factual support and the requisite level of specificity not encompassed by the Ien Complaint, in addition to naming an additional corporate entity as a defendant. Since these additions increase the likelihood of the class obtaining financial recovery, dismissal of the Pena Complaint would be prejudicial to the class and is not warranted here. The Pena Complaint goes far beyond the Ien Complaint in asserting factual allegations in support of the class's legal claims that were obtained through working with over 200 employees who either have retained or shared information with Cary Kane, as well as a private investigator. It sets forth significant facts not alleged in the Ien Complaint that are relevant to the determination of employer liability, and possible defenses including defendants' knowledge of the imminent shutdown of TransCare.

Counsel for the Pena Plaintiffs have ardently pursued and developed their claims by extensively investigating the relevant facts and law. Moreover, nearly 200 former TransCare employees have retained Cary Kane to represent them in a lawsuit against the TransCare Debtors, as well as TransCare's parent entities Patriarch Partners, LLC ("Patriarch"), Patriarch Partners III, LLC ("Patriarch III"), ARK CLO 2001-1 Limited ("ARK CLO"), ARK Investment Partners II, L.P. ("AIP"), and ARK Investment GP II, LLC ("AIG") (collectively, "non-debtor defendants," together with the debtor-defendants, "defendants"), under the Worker Adjustment and Retraining Notification Act (the "WARN ACT"), 29 U.S.C. § 2101, *et seq.*, and the New York Worker

Adjustment Retraining Notification Act ("NY WARN ACT"), N.Y. Labor Law § 860 *et seq.* (jointly, the "WARN Acts").

In light of the in-depth factual investigation undertaken by Cary Kane, the information and additional defendant introduced into the proceedings by that investigation, and the relationships that Cary Kane has developed with its clients – dozens of former TransCare employees from all divisions and levels of the debtor defendants who have been able to provide a broad and deep understanding of the latter's operations – the motion to dismiss the Pena Complaint should be denied, the cases consolidated, and Cary Kane appointed co-interim class counsel.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This action arises out of the sudden termination of TransCare employees without cause at facilities in New York, Maryland, and Pennsylvania, as a result of the shutdown of operations and the filing for bankruptcy under Chapter 7 of the United States Bankruptcy Code on February 24, 2016. *See In re TransCare Corporation* (Bankr. Case No.: 16-10407, Docket No. 1). Defendants closed each TransCare facility without advance written notice in clear violation of the WARN Acts.

Cary Kane was first contacted by and began working with TransCare employees before the latter had been told they were being terminated. (Vladeck Dec. ¶ 5) As the Firm quickly became inundated with calls from former TransCare employees, Cary Kane arranged a meeting with those employees for March 2, 2016. (Vladeck Dec. ¶ 8) That meeting was attended by over 100 terminated employees of TransCare, many of whom retained Cary Kane that day to represent them in their WARN Act claims against the company. (Vladeck Dec. ¶¶ 9-10; Jensen Dec. ¶¶ 6-7) Following that meeting, attorneys at Cary Kane began having in-depth discussions with dozens of former TransCare employees who had worked in all levels of the organization, including officers, managers, directors, supervisors, EMTs, and finance, payroll, and human resources personnel. (Jensen Dec. ¶¶ 7, 10, 20-22, 35-37) The employees provided, and continue to provide, detailed facts and documentary evidence in support of their WARN Act claims. (*Id.*) Through these discussions, it became clear class members believed that Patriarch, through its Chief Executive Officer ("CEO") Lynn Tilton, and other affiliated companies, were the true employer of TransCare employees and were responsible for the shutdown of the company. (Jensen Dec. ¶ 18) Given the number of corporate entities named in the debtors' bankruptcy filings, Cary Kane retained a private investigation firm to conduct research into the corporate relationships and capital flow of those entities related to Patriarch and TransCare. Through this research, the Firm obtained information reflecting a more complex corporate relationship between and among TransCare and the non-debtor defendants in this action, and was able to identify the entities to be named as defendants. (Jensen Dec. ¶¶ 25, 26)

After the mass layoffs and plant closings of TransCare, one other WARN Act class action was filed in this Court, and three actions were filed in the Southern and Eastern Districts of New York. The first WARN Act lawsuits filed on the behalf of a TransCare employee were filed on February 29, 2016; the law firm Levi & Korsinksy, LLP ("Levi & Korsinsky") filed an action titled *Eisenstadt, individually and on behalf of all others similarly situated, v. Patriarch Partners, LLC and XYZ Entities 1-10*, Case No.: 16-cv-01009 (E.D.N.Y.) ("Eisenstadt Complaint") in the Eastern District of New York, and the law firm Gardy & Notis, LLP ("Gardy & Notis") filed an action titled *Gisinger v. Patriarch Partners and Lynn Tilton*, Case No.: 16-cv-1564 (S.D.N.Y.) ("Gisinger Complaint") in the Southern District of New York. On March 1, 2016, Outten & Golden filed the Ien Complaint as an adversary class action in this Court. On March 2, 2016, Levi & Korsinky filed a second complaint identical to the Eisenstadt Complaint, save the named plaintiff, in the Southern District of New York, captioned *Garcia v. Patriarch Partners, LLC and XYZ Entities 1-10*, Case No.: 16-cv-01596 (S.D.N.Y.) ("Garcia Complaint").

On April 1, 2016, after an extensive factual and corporate background investigation into relevant issues in this case, as described above, this Firm filed the Pena Complaint, on behalf of the three named plaintiffs and all those similarly situated, specifically, the almost 200 employees who had retained Cary Kane to commence a WARN Act lawsuit on their behalf. The Pena Complaint seeks damages under the federal and state WARN Acts on behalf of all former TransCare employees who were terminated without cause or notice and after the bankruptcy filings on February 24, 2016, as part of mass layoffs and plant closings by defendants, for which Pena Counsel intends to ultimately seek class certification under Rule 23 of the Federal Rules of Civil Procedure, which is incorporated by Rule 7023 of the Federal Rules of Bankruptcy Procedure. To date, 194 former TransCare employees have retained Cary Kane to litigate their WARN claims and the Firm continues to receive signed retainers on an almost daily basis.

Counsel for the District Court cases have since begun the process of transferring the Eastern District action to the Southern District, and moving for the consolidation of the actions filed by Levi & Korsinky and Gardy & Notis, as well as seeking the appointment of counsel for each as co-lead interim class counsel. (Jensen Dec. ¶¶ 13, 14) The actions taken in the District Court cases suggest that those actions will all proceed as a single consolidated action in the Southern District of New York, with counsel for those firms serving as interim co-lead counsel. (Jensen Dec. ¶ 14) The Pena Complaint is far more comprehensive both in terms of the scope and depth of the factual allegations at issue and the relevant parties involved than any of the other pending matters.

Shortly after filing the Pena Complaint, Jack Raisner ("Raisner"), an attorney at Outten & Golden contacted Larry Cary ("Cary") of this Firm regarding the subsequently filed Pena Complaint. (Jensen Dec. ¶ 33) During that conversation, Cary expressed the Firm's obligations to protect the interests of the former TransCare employees who had retained Cary Kane, and the Firm's position that the Pena Complaint added additional, substantial factual allegations that had not been previously asserted in any other complaints related to TransCare. (*Id.*) Cary also raised the possibility of counsel for Cary Kane and Outten & Golden working cooperatively on this matter. (*Id.*)

Plaintiffs in all of the TransCare WARN actions allege similar causes of action on behalf of similarly situated former employees of defendants. The District Court actions assert claims against a different group of defendants in a different venue.[3] While the Pena Complaint names an additional defendant and contains substantially more factual allegations, the Pena and Ien Complaints allege similar causes of action against a similar group of defendants in the same venue, arising out of a common nucleus of operative facts. Thus, the Pena Plaintiffs seek to consolidate the Actions, and seek the appointment of Cary Kane and Outten & Golden as Co-Interim Class Counsel to facilitate the efficient administration of these matters pre-certification, and avoid unnecessary duplication of proceedings.

ARGUMENT

I. The Court Should Consolidate Related Cases

In contrast to Ien, the Pena Plaintiffs do not seek the dismissal of the Ien Action. While Cary Kane views the Pena Complaint as more comprehensive than Ien or the others, and that

[3] Pena Counsel agree with Ien Counsel's contention about this Court being the proper venue for the determination of WARN Act claims because, "[b]y filing Transcare's Chapter 7 petition, defendants chose this Court as the forum where all intertwined issues can and should be resolved." (Ien Br. at 1).

nothing in the other complaints adds to or expands in any way on the Pena allegations (with the possible exception of Ien's wage claims (*see infra*), the Pena Plaintiffs recognize the value of the participation of the Ien plaintiff, and the qualifications of their counsel in this area. For reasons of judicial economy, the two cases should be consolidated.

A. Standard for Consolidation of Related Cases

Plaintiffs seek the consolidation of the above-referenced actions. Rule 42(a) of the Federal Rules of Civil Procedure provides that "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a); *see also* Fed. R. Bankr. P. 7042 (making Rule 42 applicable in adversary proceedings). "Rule 42(a) 'empowers a trial judge to consolidate actions for trial when there are common questions of law or fact,' and where consolidation will avoid needless costs or delay." *In re Millennial Media, Inc. Secs. Litig.*, 87 F. Supp. 3d 563, 568 (S.D.N.Y. 2015) (quoting *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990)). The Court has broad discretion over the consolidation of actions, and in exercising that discretion, "courts have taken the view that considerations of judicial economy favor consolidation." *Johnson,* 899 F.2d at 1285. "In assessing whether consolidation is appropriate in given circumstances, a district court should consider both equity and judicial economy." *Devlin v. Transp. Commc'ns Int'l Union,* 175 F.3d 121, 130 (2d Cir. 1999).

B. Consolidation Promotes Efficiency and Judicial Economy, as Well as Equity

The consolidations of the Pena and Ien Actions will promote efficiency and judicial economy, as Ien Counsel admit. *See* Ien Br. at 17 ("Here, consolidation would achieve convenience and economy in the administration of the cases."). There are overlapping factual allegations and WARN claims asserted in both the Ien and Pena Complaints, such that the actions involve common questions of law and fact. The actions present substantially similar issues regarding whether defendants were each employers of the terminated TransCare employees under the WARN Act, when defendants became aware of its imminent financial collapse, whether defendants provided sufficient notice to employees prior to their terminations as part of a mass layoff and/or plant closing, and whether defendants were actively seeking a solution that would have enabled defendants to avoid or postpone any shutdown or mass layoff. As a result, each case will involve essentially the same discovery, motion practice, and trial considerations.

Moreover, no party will be prejudiced by consolidation. To the contrary, all parties will benefit from the efficient prosecution of the WARN Act claims, and the class members will benefit from both the in-depth factual analysis and findings of the Pena Counsel that will aid in the survival of any potential motion to dismiss by defendants, and also the additional wage claims asserted by the Ien Complaint, should they be found viable. (*see infra*) Indeed, an efficient and cooperative discovery process and consistent adjudications will enhance the class members' rights to a fair and equitable resolution of their dispute.

That the Pena Complaint names an additional defendant and the Ien Complaint asserts state wage claims do not alter the similar nature of these actions. *See Villella v. Chem. & Mining Co. of Chile*, 2015 U.S. Dist. LEXIS 140578, at *14 (S.D.N.Y. Oct. 14, 2015) (finding that neither the different class period asserted nor the fact that one action was brought against only individual corporate executives and the other was brought against both individual executives and the company itself "change[d] the substantial similar nature of the two actions or mitigates the benefits of consolidation"); *Kaplan v. Gelfon*, 240 F.R.D. 88, 91 (S.D.N.Y. 2007) ("Differences in causes of action, defendants, or the class period do not render consolidation inappropriate if the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interests of judicial economy served by consolidation."), *reconsidered on other grounds sub nom. In re IMAX Sec. Litig.*, 2009 U.S. Dist. LEXIS 58219 (S.D.N.Y. June 29, 2009); *Faig v. BioScrip, Inc.*, 2013 U.S. Dist. LEXIS 178754, at *4-5 (S.D.N.Y. Dec. 19, 2013) ("neither the fact that the two cases have slightly different proposed class periods and defendants, nor the fact that *West Palm Beach* alleges Securities Act violations in addition to Exchange Act violations, precludes consolidation").

Indeed, judicial economy was the reason why counsel for the Pena Action chose not to assert state law wage claims. When employees do not receive their final pay from an employer that declares bankruptcy and is shut down, they are entitled to file proofs of claim which will be treated with priority status depending on the timing. It is not clear that pursuing such claims via an adversary proceeding is available when employees can file proofs of claim. *See, e.g., In re MF Global Holdings Ltd.*, 481 B.R. 268, 272 n.1 (Bankr. S.D.N.Y. 2012), *rev'd on other grounds*, 2014 U.S. Dist. LEXIS 113853 (S.D.N.Y. Aug. 14, 2014) (where unpaid wage claims had been included as part of a WARN suit brought as an adversary proceeding, the former "should be asserted in proofs of claim… rather than in an adversary complaint"). Due to the availability of this mechanism for recovery of employee wages, and with the intent of simplifying and streamlining the issues in the present matter, Pena Counsel did not include wage and hour claims in their WARN Complaint. However, the Pena Plaintiffs do not oppose the pursuit of unpaid wages alleged, for purposes of administrative convenience, as an add-on to an adversary proceeding brought to seek equitable relief under Fed. R. Bankr. P. 7001(7), and do not oppose the maintenance of Ien's claims if the cases are consolidated.

As detailed above, "[t]he two cases involve sufficiently overlapping questions of law and fact to justify consolidation." *Faig*, 2013 U.S. Dist. LEXIS 178754, at *4. Further, as discussed below, equity requires consolidation.

C. The Pena Complaint is Not Duplicative of Any Other Pending Action and its Dismissal Would Prejudice the Class – Equity Requires Consolidation

Consolidation, as opposed to dismissal, is the proper method for addressing these related actions involving common questions of law and fact. Counsel for the Ien Action argue that because the Chapter 7 estate is "thinly funded, with the likelihood that Debtors' assets will be insufficient to satisfy a judgment" under the WARN Act, "subsequently filed duplicative actions that seek relief under the WARN Act should be dismissed." (Ien Br. at 16)[4] This very issue is just one reason why dismissal of the Pena Complaint would be inappropriate: the Pena Complaint asserts many additional and significant factual allegations that are not set forth in the Ien Complaint, and that go to ultimate recovery for the class. Dismissal of the Pena plaintiffs would therefore prejudice the class.

Given the circumstances of this particular bankruptcy, the facts added by the Pena Complaint significantly strengthen the claims of the WARN class. Counsel for the Pena Complaint agree with the conclusion of Ien's Counsel that the TransCare estate is likely to have limited resources to fund a recovery on the employees' WARN claims. For this reason, Pena Counsel took the view that it was important to invest the time and effort up front to identify those parties

[4] Counsel for Ien also argue that the causes of action in the Pena Complaint "roughly tracks those of the Ien Complaint" and that the Pena Complaint "recites the Ien Complaint's language for treating the WARN Act remedies alternatively as administrative or wage priority claims under the Bankruptcy Code, and her statement that the relief sought is 'equitable in nature.'" (Ien Br. at 4) The fact that Ien Counsel is only able to cite to two duplicative phrases that contain boilerplate language recited in many complaints of this nature, and terms of art used by courts in decisions related to cases of this nature, demonstrates that the Pena Complaint is not duplicative of the Ien Complaint. *See, e.g., In re Dewey & LeBoeuf LLP*, 487 B.R. 169 (Bankr. S.D.N.Y. 2013) (discussing whether "remedies available under the WARN Act are equitable in nature" and addressing claim that the "alleged class claims are entitled to administrative expense or wage priority status").

that should properly be included as defendants in order to increase the likelihood of recovery against co-defendants not in bankruptcy proceedings, and to gather sufficient facts to maximize the likelihood those parties would not succeed on a motion to be dismissed as co-defendants.

Facts alleged in the Pena Complaint that do not have a parallel in the Ien Complaint strengthen the position of the class in three ways. First, the Pena allegations significantly weaken the statutory defenses that TransCare was a faltering company, or had to shut down due to unforeseen business circumstances (Pena Complaint ¶¶ 49-57,67-69, 76-84), defenses for which the Patriarch defendants have clearly been trying to lay the groundwork. *See In re: TransCare Corporation*, Bankr. Case No.: 16-10407, Docket No. 11 at 3-4. Second, the Pena allegations will make it more difficult for non-debtor defendants to defeat a motion to dismiss them from the suit by filling in a clear picture of the interrelationship between and among the defendants, raising the bar for a defense that they did not operate as a single employer under the applicable standard. (Pena Complaint ¶¶ 14-21,29-38,42-47, Exh.1) Finally, this combined with the addition of another Patriarch defendant which appears to have a key ownership stake in TransCare, and to meet the other single-employer prerequisites, increases the potential pool for recovery from non-debtor defendants for a settlement or judgment in this case. *Id.* Thus, the interests of the class would be prejudiced by the dismissal of these significant factual allegations. *See In re MF Global Holdings Ltd*, 464 B.R. 619, 623 (Bankr. S.D.N.Y. 2012) ("When determining whether to dismiss a second suit, a court must 'consider the equities of the situation when exercising its discretion.'") (quoting *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000)).

1. Potential WARN Defenses are Weakened by the Pena Factual Allegations

Factual allegations in the Pena Complaint significantly weaken the ability of the defendants to rely on the two statutory defenses to a WARN claim most likely to be asserted by TransCare, including that TransCare was a faltering company, or that it was forced to shut down due to unforseen business circumstances. Through diligent research and discussion with numerous TransCare employees who held key positions in the company, Pena Counsel have developed allegations that show defendants, including TransCare, its clients, its bank, and the City and State began to learn of TransCare's precarious and ineffective finances as early as July 2015, when TransCare missed payroll, and October 2015, when it practically defaulted on its workers compensation policy. (Pena Complaint ¶¶ 91-103) Since filing its Complaint, Counsel for Pena have continued to discover new information corroborating these allegations, such as the fact that TransCare was on notice as early as September or October 2015 that its key lender would cut off its financing on the very date that the company ultimately filed for bankruptcy.[5] (*See* Jensen Dec. ¶ 37) These and other facts from the Pena Complaint will make it significantly more difficult for TransCare and its co-defendants to make out the statutory defenses that would enable them to escape or minimize their WARN liability: that TransCare was a faltering company, or that it was forced into shutting down due to unforeseen circumstances. Indeed, an entity called "Patriarch Partners Agency Services" filed papers with this Court ostensibly to urge the Court to grant a motion filed by the Trustee, but which read like a thinly veiled attempt at setting up various defenses to liability for the Patriarch entities.[6]

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[5] Given the new information that Cary Kane has received since filing the Pena Complaint, should the Court decide against consolidation, the Pena Plaintiffs will be seeking leave to file an amended complaint to include this allegation.

[6] *See* Response of Patriarch Partners Agency Services, LLC to Motion for the Entry of an Order, Pursuant to 11 U.S.C. §§ 105 and 721, Authorizing the Chapter 7 Trustee to Operate the Debtors' Businesses and Pay Certain Operating Expenses of these Estates (*In re TransCare Corporation,* Case No.: 16-10407) (Docket No. 11 at 3) (claiming that "As a result [of the allegedly unexpected refusal of Wells Fargo to extend further financing], Debtors' prepetition businesses abruptly ceased operations upon the Petition Date in the unfortunate manner that they did." This is directly contradicted by information obtained by Pena Counsel that this planned cut-off of financing was known as early as September or October of 2015. (Jensen Dec. ¶ 37)

2. The Pena Complaint Strengthens Single Employer Liability

The factual allegations in the Pena Complaint go much further than any of the previously-filed suits in illustrating the interrelationship between and among the debtors and non-debtor defendants. The Pena Complaint illustrates, both through written allegations and through a graphic depiction (Pena Complaint at 10, Exh. 1), the web that intertwines the non-debtor defendants and TransCare. The Pena Complaint details the common ownership, directors and officers, control, and operational fusion between and among all defendants. The Pena Complaint introduces another defendant into this case: ARK Investment GP II, LLC ("AIG"). Based on corporate documents, AIG is the "sole owner" of Ark Investment Partners II, L.P. ("AIP"). (Pena Complaint ¶17 and Exh. 1) Corporate records also identify Patriarch Partners as the "General Partner" of AIP. *Id.* This suggests that AIP was a pass-through for AIG or Patriarch or both.

AIG and Patriarch Partners (LLC and III) are all identified as owners of an entity that directly owned TransCare: AIG and Patriarch Partners LLC owned AIP, which directly owned TransCare, and Patriarch Partners III owned ARK CLO 2001-1 Limited, which directly owned TransCare. Through both AIP and AIG, Patriarch Partners LLC and III exercised an indirect ownership interest in TranCare. The addition of AIG and the related factual allegations in the Pena Complaint show the veritable disregard for the corporate form with which Tilton operates her network of Patriarch companies. Moreover, facts in the Pena Complaint set forth a formal and official role for Tilton with at least one of the entities that was exercising an ownership interest in TransCare, as she is the "manager" and "authorized person" indicated in corporate filings for AIG. (Pena Complaint ¶ 18 and Exh. 1) In these and other ways, the Pena Complaint strengthens the facts that will be needed for a finding that a group of entities operated as a single employer under applicable law.

3. The Pena Complaint Increases the Likelihood and Availability of Recovery for the WARN Class

By identifying, describing, and naming AIG as a defendant, and by providing far more detail about the other non-debtor defendants than can be found in the other WARN actions, Pena Counsel have submitted a fuller picture about the responsible parties for the damages incurred by the WARN class. The Pena allegations meet the requisite pleading standard, particularly at this stage, to show that the five non-debtor defendants have liability to the class. The addition of defendant AIG, structured the way it is as an indirect owner of TransCare (since it owns AIP a direct owner), increases the likelihood of recovery by plaintiffs, since it appears that AIG, rather than its subsidiary AIP, actually holds meaningful assets. Maximizing the likelihood that all liable parties are included and ultimately held responsible is particularly important where, as here, creditors have been informed at a very early stage in the proceedings that no proofs of claim deadline will be set due to the expectation of the trustee that no assets will remain in debtor's estate to cover unsecured claims. (Vladeck Dec. Exh. A)

Given that the Pena Complaint contains numerous, pertinent factual allegations that are not encompassed by the Ien Complaint, the class would be prejudiced by its dismissal. Accordingly, to most broadly preserve the interests and rights of all class members, the Pena and Ien Actions should be consolidated.

II. The Court Should Appoint Cary Kane as Co-Interim Class Counsel

Cary Kane amply satisfies the factors under Fed. R. Civ. P. 23(g)(1) for appointment of Interim Class Counsel, and is ready and willing to serve as interim class counsel if the Court finds the appointment of a single firm is in the best interests of the class. However, since the Pena Plaintiffs seek the consolidation of the Pena and Ien Actions, and given Outten & Golden's experience in this particular area of the law, Cary Kane respectfully requests that this Court appoint

Cary Kane and Outten & Golden to serve as Co-Interim Class Counsel. Appointment of Co-Interim Class Counsel is critical to advancing this litigation in an efficient manner and in the best interests of the class.

A. Standard for Appointment of Co-Interim Class Counsel

Rule 23 of the Federal Rules of Civil Procedure authorizes the appointment of interim class counsel "to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). "[W]here multiple overlapping and duplicative actions have been transferred to a single district for coordination of pretrial proceedings, designation of interim class counsel is encouraged, and indeed is probably essential for efficient case management." *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

"In selecting interim counsel, courts have looked to the criteria for determining the adequacy of class counsel set forth in Rule 23(g)(1)(A): (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class." *Anderson v. Fiserv, Inc.*, 2010 U.S. Dist. LEXIS 13926, at *6 (S.D.N.Y. Jan. 29, 2010). Moreover, under Rule 23(g)(1)(B), courts may consider any other matter relevant to counsel's ability to adequately represent the interests of the class, including "the quality of the pleadings[,] ... the vigorousness of the prosecution of the lawsuits[,] ... and the capabilities of counsel...." *In re Bank of Am. Corp. Sec., Derivative & ERISA Litig.*, 258 F.R.D. 260, 272 (S.D.N.Y. 2009) (citations and internal quotation marks omitted). "Ultimately, the court's task in deciding these motions is 'to protect the interests of the plaintiffs, not their lawyers.'" *In re Parking Heaters*

Antitrust Litig., 310 F.R.D. 54, 57 (E.D.N.Y. 2015) (quoting *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* ("*Interchange*"), 2006 U.S. Dist. LEXIS 45727, at *38 (E.D.N.Y. Feb. 24, 2006)).

B. Cary Kane Satisfies the Rule 23(g) Standard for Appointment of Class Counsel

As set forth below, and in the accompanying declarations of Pena Counsel, Cary Kane plainly satisfies all of the Rule 23(g) criteria for appointment of Interim Class Counsel.

1. Cary Kane Has Invested Substantial Work in Investigating Potential Claims and Defendants

As demonstrated above, Cary Kane has already invested substantial time and effort by several attorneys into investigating and developing the Pena Complaint. Cary Kane has committed extensive Firm resources into interviewing dozens of former TransCare employees, hiring private investigators to discover the relevant corporate non-debtor defendants and their relationships to the debtors, conducting legal and fact research pertinent to the claims at issue, analyzing potential claims and defenses, reviewing extensive client records and other materials relevant to this action, communicating with various interested parties involved in this action, and drafting a detailed 180-paragraph complaint. (Jensen Dec. ¶¶ 6-7, 10, 18-27)

In addition, Cary Kane quickly mobilized in response to dozens of inquiries when first contacted by TransCare employees, first before the Ien Action was filed, and then after it knew of the filing. Its work with these employees has led to about 200 individual former employees to retain it, and it has worked closely with them to acquire a deep understanding of the relevant parties and issues.

All of the above supports the appointment of Cary Kane as interim class counsel. *See In re MF Global Holdings Ltd.*, 464 B.R. at 625 (appointing interim counsel on the basis that the firm had "met with dozens of putative class members, reviewed extensive materials pertinent to the litigation, researched relevant case law, and drafted an amended complaint," and also due to the fact that "[a]pproximately 140 individual ex-MF Global employees have already retained [proposed interim counsel] to litigate their WARN claims"). The same is true with regard to appointing it co-interim class counsel.

2. Cary Kane is Experienced and Knowledgeable about the Applicable Law

Cary Kane regularly represents employees in wage and hour and employment lawsuits, and has done so since the Firm was established in 2004. (Jensen Dec. ¶¶ 38-47) Cary Kane has experience in litigating employment cases on behalf of individual clients, as well as class and collective actions, including class action WARN lawsuits in bankruptcy court. (Vladeck Dec. ¶¶ 36-40)

As illustrated by the above discussion of the legal issues in this case, which Pena Counsel carefully considered and sought to address before and as part of filing the Pena Complaint, and by the qualification of the attorneys and firm, Pena Counsel are well-versed in the applicable law in this case, in the posture of dealing with a WARN case as an adversary proceeding in bankruptcy court, and in the issues that can be expected to arise. Pena Counsel do not contest Outten & Golden's status as a leader in this area, but Outten & Golden certainly cannot intend to argue that this status affords them the exclusive right to file and litigate such cases. Pena Counsel filed suit because of their responsibility to the hundreds of TransCare employees who have either retained them or consulted with them, to bring the strongest possible claims on their clients' behalf, and because, in the considered opinion of counsel, there was additional information that had not yet appeared in the earlier filings and that stood to make significant contributions to the value of the case and likelihood of recovery on behalf of the class.

3. Cary Kane Will Continue to Commit the Necessary Resources to this Action

As demonstrated by the resources the Firm has already invested into the pre-filing investigation and development of the facts and claims in this action, Cary Kane will continue to commit the resources necessary to vigorously prosecute this action, including the expertise and efforts of Cary, founding partner of the Firm, two senior associates and a junior associate, and the engagement of any other outside resources that may be required. Cary Kane is prepared to devote the time and resources necessary to prosecute this case successfully. Cary Kane has been involved in major complex litigation and is fully aware of, and prepared to dedicate, the human and other resources necessary to achieve the best possible result for its clients and to advance expenses as necessary in class action contingency cases. (Jensen Dec. ¶¶ 38-50)

4. The Quality of the Pleadings and Vigorousness of Prosecution Supports Cary Kane's Appointment as Interim Class Counsel

The Pena Complaint was the product of a comprehensive investigation into potential claims on behalf of former TransCare employees, and relevant employer entities. (Jensen Dec. ¶¶ 4-7, 10-12, 18-30) Only after this comprehensive investigation did the Firm draft a highly-detailed, thorough complaint. The quality of the Pena Complaint and the vigorousness of the Firm's prosecution of this matter to date weighs in favor of Cary Kane's appointment as Co-Interim Class Counsel. *See In re Comverse Tech., Inc. Derivative Litig.*, 2006 U.S. Dist. LEXIS 94235, at *14 (E.D.N.Y. Sept. 22, 2006) (rejecting first-filed argument and "focus[ing] the inquiry on the quality of the pleadings to determine the work counsel and their respective clients have done thus far in investigating and identifying potential claims in this action" and finding that scale tipped in favor of appointing as lead counsel the attorneys who filed a more comprehensive complaint). Cary Kane has served and will continue to serve the best interests of all members of the WARN class.

C. A Co-Lead Class Counsel Structure Would Best Serve the WARN Class

"If only one applicant seeks appointment as class counsel, a court must determine whether the applicant is 'adequate' under Rule 23(g)(1) and Rule 23(g)(4),which requires that counsel 'fairly and adequately represent the interests of the class.'" *Anderson*, 2010 U.S. Dist. LEXIS 13926, at *7. "Faced with competing 'adequate' applicants, however, 'the court must appoint the applicant best able to represent the interests of the class.'" *Id.* (quoting Fed. R. Civ. P. 23(g)(2)).

For the reasons set forth above, Cary Kane is more than capable of fairly and adequately representing the interests of the class. Pena Counsel believes, however, that the interests of the class would best be served by a co-counsel arrangement between Cary Kane and Outten & Golden where counsel "will work together to maximize recovery for the proposed class." *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 50 (S.D.N.Y. 1998). Combining the WARN litigation experience of Outten & Golden with Cary Kane's extensive fact investigation and the participation and resources of Cary Kane's approximately 200 clients would best serve the interests of the class.

Ien Counsel rely on *In re Digital Domain Media Grp.*, 2012 Bankr. LEXIS 5756 (Bankr. D. Del. 2012), in support of their position that "[i]n thread-bare cases, limiting the number of counsel involved in the prosecution of the WARN claims will help preserve estate assets to the benefit of all parties." (Ien Br. at 8) However, the complaints in that case are hardly comparable to those in TransCare. In *Digital Domain*, two firms each filed a simple, bare-bones, eight-page complaint asserting the same set of underlying facts against the same parties. The initial posture of both actions was far simpler than TransCare, as no "single employer" theory of liability was pleaded in either of the *Digital Domain* complaints, nor did either complaint name any non-debtor corporate defendants. Moreover, unlike the "dueling actions" in *Digital Domain* where the "underlying facts [were] identical, if not yet fully developed," the Pena Complaint sets forth a comprehensive factual context for the termination of the TransCare class members, allegations that are not included in the Ien Complaint. *See In re Digital Domain Media Grp.*, 2012 Bankr. LEXIS 5756, at *6. That case is further distinguishable because, as stated above, the Pena Complaint's naming of an additional non-debtor defendant increases the availability of funds to potentially be recovered, which is particularly significant here, where the Trustee has already informed creditors that he does not expect that any of the debtors' assets will be left to cover unsecured claims, and that there was no need to file proofs of claims for such claims at this time. (*See* Vladeck Dec., Exh. A) Notably, the court in *Digital Domain* court appointed as interim class counsel the firm that had already been retained by over 100 of the class members. 2012 Bankr. LEXIS 5756, at *5. Unlike the duplicative complaints in *Digital Domain*, the case at bar involves two firms that filed complimentary complaints and bring different strengths to the table. Accordingly, the appointment of Cary Kane as Co- Interim Class Counsel with Outten & Golden best serves the interests of the class.

CONCLUSION

For the foregoing reasons, the Pena Plaintiffs respectfully request that the Court consolidate the Pena and Ien Actions and appoint Cary Kane and Outten & Golden as Co-Lead Interim Class Counsel, together with such other relief as the Court deems just and proper.

Dated: April 19, 2016
New York, New York

Respectfully submitted,

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By: ______________________
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